(3)

No. 04-508

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHNNA E. BURTON,

Petitioner,

v.

BUCKNER CHILDREN & FAMILY SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did this Court's decisions in *Desert Palace* and *Reeves* blur or erase the distinction between "mixed motive" and "pretext" cases or change the evidentiary burdens or analysis to be applied?

2. If a non-movant's evidence is circumstantial, do the requirements of Federal Rule of Civil Procedure 56 regarding the nature and quality of the evidence not apply?

3. Do determinations of the quality of a non-movant's evidence, *e.g.*, whether it is affirmative, probative and proper under Federal Rule of Civil Procedure 56, weigh the evidence or constitute credibility determinations?

4. Are the district and appellate courts required to set out in detail the non-movant's evidence and explain why it fails to constitute sufficient, probative evidence or to raise a genuine issue of material fact?

5. Should this Court accept Petitioner's challenge "to delineate what is or is not a case that will survive summary judgment," *i.e.*, resolve prospectively in what circumstances the evidence is sufficient?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Buckner Children & Family Services, Inc., a non-profit corporation, has the following parent:

Buckner Baptist Benevolences

No other publicly held company owns 10% or more of them.

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STATEMENT OF THE CASE

Petitioner, Johnna E. Burton (Burton) sued Buckner Children & Family Services, Inc. (Buckner) claiming that the termination of her employment was age discrimination in violation of Section 21.051 of the Texas Commission on Human Rights Act ("TCHRA") and violated 29 U.S.C. § 2615 of the Family and Medical Leave Act ("FMLA"). Buckner moved for summary judgment on all of Burton's claims. The district court granted Buckner's motion on Burton's age discrimination claim because there was no evidence of discrimination and Burton provided no rebuttal of pretext to Buckner's showing of a legitimate, nondiscriminatory reason for terminating Burton. (App. p. 14). The district court granted Buckner's motion as to Burton's FMLA claim because Burton failed to provide evidence to establish a *prima facie* case and because Buckner proffered a legitimate nondiscriminatory reason. (App. p. 17).

The Fifth Circuit affirmed the grant of summary judgment in Buckner's favor on Burton's age discrimination claim, holding that Buckner established that Burton was dismissed for inadequate performance and that the alleged discrepancies in Buckner's summary judgment evidence were not supported by Burton's evidence or were so trivial as to be immaterial. (App. p. 3). With respect to Burton's FMLA claim, the Fifth Circuit affirmed the summary judgment because Burton failed to establish a *prima facie* case and failed to create a genuine issue of material fact with respect to Buckner's legitimate nondiscriminatory reason for terminating her employment. (App. p. 3-4).

STATEMENT OF FACTS

Burton was hired part-time in the mid-1990's and later was hired full-time as Special Events Coordinator. (R. 99). Burton was terminated on October 25, 2000 due to consistent, documented performance problems. (R. 104-124, 136-138). These problems included not complying with Buckner's policies and procedures, not completing assigned tasks (either on time or at all), not showing up for scheduled appointments with staff and external constituents, a negative attitude, excessive absences, threatening to quit on numerous occasions, and not reflecting the team values that Buckner expected from a person in Burton's position. (R. 109-127, 131-138). On at least eight separate occasions between January of 2000 and October 18, 2000, Burton was given notice and ample opportunity to improve her job performance. (R. 104, 113, 125, 131, 133, 134). When the problems were not corrected, her employment was terminated. (R. 136-138).

MISSTATEMENTS OF FACT AND LAW

In her statement of facts and throughout her petition, Burton makes several misstatements of fact. These are:

1. There is no direct evidence of FMLA discrimination.

The evidence that Burton characterizes as "direct" evidence, and on which she relies throughout her petition, are handwritten notes. She states these notes were prepared by JoAnn Cole and prepared by Cole as a listing of Burton's job failures in response to an email request from Karen Bailey. See Pet. pp. 6, 12, 14, 15, 22 (App. pp. 19-20).

However, there is no evidence in the record that these notes were prepared by Cole or that, even if prepared by Cole, they were in response to Bailey's request or are a listing of Burton's job failures. Burton took the depositions of JoAnn Cole and Karen Bailey (Houston) and submitted portions of them in support of her response to Buckner's motion for summary judgment. However, none of that deposition testimony, nor any other evidence, established the authorship or the purpose of the handwritten notes.

2. Two people were not hired to replace Burton.

Burton states she was replaced by two people. See Pet. p. 8. In her declaration, Burton made the conclusory allegation that she was replaced by two people both under the age of 40. (R. 172). Burton was not working at Buckner when Wally Jeffers and Jill Lewis were hired and failed to show any basis for personal knowledge of who replaced her or his/her/their ages. Burton's admissions and other responsive summary judgment evidence show that Jeffers (41 years of age when hired) replaced her and that Lewis was hired as the Volunteer Coordinator, a position Burton supervised when she was employed by Buckner. (R. 186, 194, 203, 212, 213, 222, 228).

3. Burton's job performance problems predated her exercise of FMLA.

Burton notified Buckner of her need for FMLA leave on July 26, 2000. She did not, as she states, perform admirably up until that time. See Pet. pp. 8, 12. Burton completely fails to apprise this Court of meetings held with her in January and March of 2000, in which many of the same problems documented in the July, August and

September 2000, memoranda were discussed with her. (R. 104-110, 113).

4. No inconsistent reasons were given as to why Burton was terminated.

In discussing the Fifth Circuit's alleged application of an improper standard, Burton appears to assert that the evidence showed varied reasons were given by Buckner's employees for her discharge. See Pet. pp. 8, 16. There is no evidence that Burton was discharged other than for consistent job performance problems, and none of the deposition testimony of Buckner's employees, offered by Burton in response to Buckner's motion for summary judgment, contains any other reason.

In her questions presented and throughout the petition, Burton makes arguments and raises issues that are not properly before the Court. These are:

1. This is not a mixed-motive case or direct evidence case. In her Question No. 6, Burton poses a question regarding this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). This is the only place in her petition in which she refers to *Desert Palace* or to mixed-motive. However, in several of her questions and in her petition, Burton refers to "direct" evidence of improper motive.

The parties and the courts below treated this as a "pretext" case, applying the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 248, 67 L.Ed.2d 207 (1981). This was the correct analysis inasmuch as there is no evidence that the decision to

terminate Burton was based on legitimate *and* illegitimate reasons. Indeed, Burton has consistently contended that Buckner had no legitimate reason to terminate her employment.

There is nothing in this Court's decision in *Desert Palace* that suggests that the distinction between "mixed-motive" and "pretext" cases recognized by this Court in *Price Waierhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 286 (1989), has disappeared or that the *McDonnell Douglas* burden-shifting scheme no longer exists.

2. There is no evidentiary issue with respect to discriminatory statements.

In her argument at page 20 of her petition, Burton argues that a plaintiff's affidavit suffices to defeat summary judgment and cites cases which leave the impression that her declaration contained testimony as to statements made by Buckner.

While an employee's testimony regarding an employer's statements is not considered subjective belief and is considered direct evidence, *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195 (5th Cir. 2001), Burton's declaration contains no testimony regarding discriminatory statements by Buckner.

REASONS FOR DENYING THE WRIT

1. The Fifth Circuit's opinion does not conflict with this Court's opinion in *Reeves* or with other opinions from the Fifth Circuit or other Circuits.

In its opinion, the Fifth Circuit held that summary judgment was proper on Burton's age discrimination

claims because Burton's attempts to cast doubt upon Buckner's stated reason for her dismissal were either unsupported by the record or were so trivial as to be immaterial. (App. p. 3). With respect to Burton's FMLA claim, the Fifth Circuit affirmed the summary judgment granted in favor of Buckner, holding that Burton did not make a *prima facie* case of discrimination under the FMLA and that, even if she had, she failed to create a genuine issue of material fact. (App. pp. 3-4).

While the Fifth Circuit did not do an exhaustive analysis of *Reeves* in its opinion, it referred to and relied on the decision of this Court in reviewing the matter before it. The opinions from the Fifth Circuit and other Circuits that Burton cites as being in conflict with the decision here show no conflict with the legal principles by which the courts below reviewed the evidence and rendered their decisions. The only difference between those cases and this one is that the litigants in the other cases offered sufficient *competent* summary judgment evidence to raise a fact issue. Burton did not do so and rather than present this Court with any compelling reason for review, simply reargues her case. However, the record establishes that this is one of those cases recognized by this Court, and the lower courts, where no rational factfinder could conclude that discrimination occurred. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000).

2. This Court's opinion in *Reeves* did not lessen or alter the quality or nature of proof required to raise a fact issue.

Both the district court and the Fifth Circuit held that Burton's allegations of discrimination and falsity and

pretext were not supported by evidence or were based on subjective belief, conclusion and speculation or created only immaterial issues. Burton argues that the lower courts misapplied the standard of review. However, the standard of review does not require that courts accept less than competent, *i.e.*, affirmative, probative, summary judgment evidence.

A non-movant's burden is not satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to material facts, or a scintilla of evidence. *Douglass v. United Serv. Auto Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*). A plaintiff cannot rest on her allegations to get to a jury without "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Likewise, testimony based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment motion. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

In *Reeves*, this Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence. *Id.* at 147. This Court did not hold that this proof did not have to meet the standards of Rule 56.

3. The Fifth Circuit did not misapply the standard for review of summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a summary judgment shall be rendered when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Only disputes over material facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. To avoid summary judgment, the non-movant must go beyond the pleadings and by competent summary judgment evidence set forth "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The standard for review of a grant of summary judgment is well-established. The Court must review the record as a whole, drawing all reasonable inferences in favor of the non-movant and must not make any credibility determinations or weigh the evidence. *Reeves*, 530 U.S. at 150.

Initially, Burton seems to insist that a court may not consider an employer's evidence regarding the reason for termination at all because it comes from interested witnesses. This, however, confuses the standard of review with the employer's burden under the *McDonnell Douglas* burden-shifting analysis.

McDonnell Douglas and subsequent decisions "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

First, the plaintiff must establish a *prima facie* case of discrimination. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 252-253. The burden then shifts to the employer to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254. At this stage, the burden is one of production, not persuasion. In other words, does the evidence show a legitimate nondiscriminatory reason? See *Raytheon Company v. Hernandez*, 540 U.S. 44, 124 S.Ct. 513, 519, 157 L.Ed.2d 357 (2003).

In this case, Buckner produced affirmative, probative evidence establishing that Burton was terminated for performance problems. In January 2000, almost nine months before she was terminated, Buckner's Regional Director of Development had a meeting with Burton. Burton was angry, frustrated, threatened to resign if she did not receive more assistance to perform her job and threatened that if she left her friends and contacts "would pull their support if she was not in charge." (R. 104-108). This meeting was documented in a January 30, 2000 memorandum. (R. 107, 108).

On March 29, 2000, Buckner's President/CEO and the Vice President of Human Resources and Quality Assurance met with Burton to discuss her poor job performance and her failure to complete her job responsibilities. (R. 109, 110). Burton received, edited and signed the March 31, 2000 memorandum of this meeting, which discussed and summarized her performance problems and issues. (R. 113).

On July 21, 2000, Cole met with Felipe Garza, Burton's supervisor, to discuss issues relating to Burton's lack of availability. (R. 121). As a result of this meeting, Cole

and Burton met on July 24, 2000, and discussed numerous performance deficiencies. (R. 121, 125). On July 25, 2000, Burton and Cole met again because Burton thought the concerns expressed in the July 24th meeting were "petty and that she was offended." (R. 121, 127). Burton responded to the concerns about her job performance that were raised in the July 24th meeting by a memorandum she prepared, dated August 2, 2000. (R. 191-192).

On August 4, 2000, another meeting was held with Burton. This meeting addressed Buckner's continued unhappiness with Burton's level of availability to and response to volunteers, donors, and co-workers, and her failure to obtain approval before committing to special events or major donations to campus programs. (R. 122, 131, 132). Cole prepared a memorandum of the meeting, dated August 7, 2000, which Burton signed. (R. 131, 132). On August 17, 2000, yet another meeting occurred to discuss Burton's failure to timely send out letters regarding a fund-raising event, which was part of her job responsibilities. (R. 122, 133). Burton was given a deadline to complete and turn in a project list related to the event, which she failed to meet. (R. 133, 134).

The recurring problems with and complaints about Burton ultimately led Mr. Garza to the decision to terminate Burton's employment. (R. 137-138). Job performance problems and failures are a legitimate reason for termination of employment. See *Reeves*, 530 U.S. at 142 (failure to comply with job responsibilities).

The remainder of Burton's arguments relate to her claim that under the correct standard of review, there are genuine issues of material fact precluding summary

judgment. However, the record does not support this claim.

4. Under the standard of review for summary judgment, there is no issue of material fact.

Buckner moved for summary judgment on the grounds there was no evidence of essential elements of Burton's *prima facie* case of age discrimination. However, the district court assumed, without deciding, that Burton could make a *prima facie* case of age discrimination. (App. p. 10). The Fifth Circuit did not address whether Burton made a *prima facie* case, holding summary judgment was proper because Burton's allegations were not supported or the alleged discrepancies in Buckner's evidence were so trivial as to be immaterial. (App. p. 3).

To establish a *prima facie* case Burton had to prove: (1) she was discharged; (2) she was qualified for the position at issue; (3) she was within the protected age class (over 40 at the time); and (4) she was replaced by someone younger or otherwise discharged because of her age. *Reeves*, 530 U.S. at 142. Burton offered no competent summary judgment evidence that she was discharged because of her age. Her declaration that she "was replaced by Wallie [sic] Jeffers and Jill Lewis [and] those individuals are under 40" is simply conclusory. Burton did not set out, and there is no evidence of, the basis for personal knowledge as to the people who replaced her or their ages. (R. 172).

Burton admits now that one of those who allegedly replaced her, Wally Jeffers, was over 40. See Pet. p. 8. As to Jill Lewis, Burton's own summary judgment established that Lewis did not replace Burton as she represents to this

Court. Lewis was hired as the Volunteer Coordinator. (R. 228). This position existed prior to Burton's termination and it was part of Burton's job to supervise the Volunteer Coordinator. (R. 186, 194, 213, 218). Burton's other evidence established that Jeffers was hired to fill her position. (R. 203, 212, 213, 222).

Buckner also moved for summary judgment on the grounds there was no evidence of essential elements of Burton's *prima facie* case of discrimination because of her FMLA leave. Both the district court and the Fifth Circuit held that Burton failed to establish her *prima facie* case. (App. pp. 4, 17).

To establish a *prima facie* case under the retaliation and discrimination provisions of 29 U.S.C. § 2615, Burton had to show that: (1) she engaged in an activity protected by the FMLA, such as taking or requesting leave; (2) an adverse employment action occurred; and either (3a) she was treated less favorably than an employee who had not requested FMLA leave or (3b) the adverse decision was made because she took FMLA leave. *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 768 (5th Cir. 2001).

Burton was granted FMLA leave, effective July 26, 2000. (R. 128-130).[1] Burton offered no evidence that she

[1] Burton takes issue with the district court's conclusion that Buckner learned of Burton's request for FMLA leave on July 26, 2000 because Cole testified only that she received a call "toward the end of July" from Burton. See Pet. p. 16. She argues that one could conclude Buckner learned of her request before July 26th because Burton was not at work that day. See Pet. p. 16. However, the Employer Response, signed by Burton on August 4, 2000, states that she notified her employer on July 26, 2000 of the need for leave. (R. 128-29). That Cole could not recall the exact date she learned of Burton's request does not raise an issue of material fact.

was treated less favorably than an employee who had not requested leave under the FMLA. The only reference in the record to any other employee and FMLA was Burton's declaration where she stated "I was replaced by Wallie [sic] Jeffers and Jill Lewis. Both of those individuals . . . to my knowledge have never sought Family Medical Leave for any reason." (R. 172). In her petition in this Court, Burton attempts to compare herself to Cole. However, as noted by the Fifth Circuit, there is no evidence that Cole had never used FMLA leave or that Cole's infraction was nearly identical to Burton's infractions for which her employment was terminated. (App. 3-4). Burton takes issue with the Fifth Circuit's "nearly identical" language and appears to construe this as an imposition by the Fifth Circuit of a requirement that the plaintiff and the employee to whom comparison is made be identically situated (or nearly so) in every single aspect of their employment. See Pet. p. 23.

In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283, n. 11, 96 S.Ct. 2574, 2580, 49 L.Ed.2d 493 (1976), this Court, addressing claims of racial discrimination based on the disparate treatment of employees for the same infraction, noted that "precise equivalence in culpability" is not the question and reaffirmed that allegations of disparate treatment for acts of comparable seriousness was adequate to plead an inferential case that the employer's reliance on the employee's misconduct as grounds for discharge was pretext. See *McDonnell Douglas*, 411 U.S. at 804.

Burton contends that she "demonstrated that JoAnn Cole committed job failures but nevertheless received no discipline" or documentation. See Pet. pp. 16, 23. What Burton showed was that Cole was verbally counseled by

her supervisor regarding Cole's failure to timely respond to emails. (R. 220-1). This infraction is hardly comparable in seriousness to those of Burton for which her employment was ultimately terminated.

The Fifth Circuit did not compare job functions or responsibilities but infractions as this Court has instructed and Burton has presented no issue to this Court regarding comparator evidence and failed to make a *prima facie* case of discrimination because of her FMLA leave.

Although the district court and the Fifth Circuit held that Burton failed to make a *prima facie* case of discrimination under the FMLA, and the district court assumed she had made such a showing in her age discrimination claim, they each also held that Burton failed to create a genuinely contested issue of material fact with respect to Buckner's legitimate nondiscriminatory reasons for terminating her employment. (App. 4, 17).

If a plaintiff makes a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802. If the defendant meets its burden, the discrimination presumption disappears, and the plaintiff bears the burden of proof of intentional discrimination and of demonstrating that the defendant's reason is pretextual. *Reeves*, 530 U.S. at 142; *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 738 (Tex. 2003). However, an employer is entitled to summary judgment if the plaintiff creates only a weak issue of fact that "the employer's reason was untrue and there is abundant and uncontroverted evidence that no discrimination occurred." *Reeves*, 530 U.S. at 148.

There is no evidence of discriminatory animus. Furthermore, mixed-motive was not an issue below. Burton focuses and focused her arguments on the alleged falsity of Buckner's summary judgment evidence and reasons for Burton's dismissal. The matters which Burton claims create a "suspicion of mendacity" appear to be: (1) questions regarding when certain documents may have been created; (2) questions regarding whether meetings did or did not occur; and (3) discrepancies between two witnesses' testimony. However, under the evidence, it is clear that Burton's dismissal had nothing to do with her age or her exercise of FMLA rights.

Burton represents to this Court that she performed admirably until she exercised FMLA in July of 2000 and that the first piece of disciplinary paperwork was allegedly prepared on July 24, 2000. However, Buckner's summary judgment evidence established that in January 2000, almost nine months before her employment was terminated, Buckner's Regional Director of Development met with Burton. Burton has never disputed that she had this conversation with the Regional Director or that she was upset and angry and made demands and threats as documented. (R. 105, 107, 108).

On March 29, 2000, Buckner's President and CEO and the Vice President of Human Resources and Quality Assurance met with Burton to discuss her poor job performance and her failure to complete her job responsibilities. (R. 109, 110). Again, Burton does not dispute that this meeting occurred or that Buckner's concerns about her conduct and attitude were expressed and addressed in March of 2000.

As noted above, beginning on July 24, 2000, Cole met with Burton several times to discuss numerous performance deficiencies and Cole documented each meeting. Burton questions whether any memorandum not bearing her signature existed prior to her dismissal or her bringing suit. However, this is only speculation on Burton's part. In some cases Burton seems to intimate that a meeting between her and Cole did not occur. However, Burton's own summary judgment evidence established that meetings did occur. Burton's August 2, 2000, memorandum to Cole specifically refers to the July 24, 2000 meeting. (R. 191-192). Further, Cole's memorandum of August 7, 2000, which Burton signed, also refers to their July 24, 2000 meeting. (R. 131).

While Burton may speculate on whether a document existed on a certain date, she cannot dispute that Buckner's concerns about her job performance were raised and communicated to her prior to July 26, 2000. Burton's own August 2, 2000 memorandum addressed the concerns raised in the July 24 2000, memorandum, almost point for point. (R. 125-126, 191-192). Many of these same concerns were addressed in the March memorandum. (R. 113).

The recurring problems with and complaints about Burton ultimately led Garza to the decision to terminate Burton's employment. (R. 137-138). It is Garza's receipt of complaints about Burton that forms the basis of her argument that Garza's and Hall's testimony are in such conflict that one of them must be lying. See Pet. pp. 13, 24. Contrary to Burton's statements, Hall did not deny having conversations with Garza. (R. 199, 202). Hall testified he informed Garza of ongoing issues with Burton when Garza first came on. (R. 199). Garza confirmed this. (R. 206-207). Hall testified he communicated complaints about the golf

tournament to Garza. (R. 199). Garza confirmed that Hall called and gave him feedback on issues relating to the golf tournament. (R. 207-208). The lower courts clearly reviewed all of the evidence Burton offered in response to Buckner's motion for summary judgment. The evidence simply does not support Burton's arguments or her claims.

Burton's employment was terminated solely for performance reasons. No disciplinary action, including but not limited to her dismissal, was taken against Burton because of her age or her assertion of any FMLA rights and the district court correctly granted summary judgment in favor of Buckner and the Fifth Circuit correctly affirmed the summary judgment.

5. The standard for granting summary judgment is well-established and there is no need to resolve prospectively in what circumstances the evidence is sufficient to create a fact issue.

Burton asks this Court "to delineate what is and what is not a case that would likely survive summary judgment." See Pet. p. 21. However, this Court has declined to do so, stating:

> Whether a judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of any proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for summary judgment as a matter of law. . . . For the purposes of this case, we need not – and could not – resolve all of the circumstances in which such factors would

> entitle an employer to judgment as a matter of law.

Reeves, 503 U.S. at 148-149. Likewise, there is no need for the purposes of this case to set out what evidence will raise a fact issue precluding judgment as a matter of law in every employment discrimination case.

CONCLUSION

Respondent Buckner Children & Family Services, Inc., prays that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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